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Supreme Court of the United States

OCTOBER TERM, 1976

Nos. 76-1724, 76-1841, 76-1842

FEDERAL COMMUNICATIONS COMMISSION, AMERICAN BROADCASTING COMPANIES, INC., and NATIONAL ASSOCIATION OF BROADCASTERS, *Petitioners,*

v.

HOME BOX OFFICE, INC., et al., *Respondents.*

On Petitions for Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF IN OPPOSITION TO PETITIONS FOR WRITS OF CERTIORARI ON BEHALF OF RESPONDENTS HOME BOX OFFICE, INC., AMERICAN TELEVISION AND COMMUNICATIONS CORPORATION, MANHATTAN CABLE TELEVISION, INC., TELEPROMPTER CORPORATION, UA-COLUMBIA CABLEVISION, INC., VIACOM INTERNATIONAL INC. and WARNER CABLE CORP.

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This brief is submitted by respondent cable television companies in opposition to petitions for writs of certiorari filed by the Federal Communications Commission ("FCC"), the National Association of Broad-

casters ("NAB"), and American Broadcasting Companies, Inc. ("ABC").

QUESTIONS PRESENTED

The FCC originally banned from the new medium of pay cable (1) all series-type programs, (2) most motion pictures and (3) thousands of sports events. But, under judicial challenge, the FCC abandoned the heart of its regulatory scheme: it repealed the series ban and renounced the motion picture rule. All that remains are the sports rules and two subsidiary regulations that received scant FCC attention (a ban on advertising and a limitation of the time eligible for movies and sports combined). The court below unanimously invalidated all of the rules, concluding that they exceeded the FCC's jurisdiction, violated the First Amendment, were grossly overbroad, ignored relevant antitrust considerations, were arbitrary, and lacked any record support. The court also found a procedural error—namely, *ex parte* contacts which shaped the rules to insulate broadcasters against potential competition from a new technology.

In these circumstances, the petitions raise the following questions:

1. Since the FCC has now repudiated the major part of its regulatory scheme, should this Court grant certiorari to review the remaining sports and other rules which are just as illegal and arbitrary as the abandoned series and feature film rules?

2. Since all the rules are invalid on the merits for numerous substantive reasons, should this Court grant certiorari to review the procedural *ex parte* question,

particularly since the FCC's challenge is focused on *dictum* in the opinion below which is currently the subject of further consideration by the lower court in another pending case?

3. Since the FCC repudiated the feature film rule, should this Court grant NAB's and ABC's petitions which appear to seek review as to that abandoned rule?

COUNTER-STATEMENT OF THE CASE

Cable television, unlike over-the-air television, has multi-channel capability and is basically supported by subscribers rather than advertisers. It is generally recognized that cable possesses great potential as a national broadband communications system and as an antidote to broadcasting spectrum-scarcity and network dominance.[1] Pay cable uses one or more of the cable channels not devoted to the retransmission of over-the-air television signals to offer subscribers greater diversity—namely, an opportunity to see feature films (unedited, uncut and uninterrupted), live sports events not available on commercial television, and other special programs—all in the comfort of the viewer's home, at a fraction of regular box-office prices, and at more frequent and convenient times than programs offered by commercial television. Pay cable, which began several years ago, now reaches only about

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[1] *See, e.g., Cabinet Committee on Cable Communications, Report to the President* 9-10, 14-16 (1974); *R. Noll, M. Peck & J. McGowan, Economic Aspects of Television Regulation* vii, 183-94 (The Brookings Institution, 1973) (hereinafter "*Noll, Peck & McGowan*"); Hagelin, *The First Amendment Stake in New Technology: The Broadcast-Cable Controversy*, 44 *U. Cin. L. Rev.* 427, 524 (1975).

1% of the more than 70,000,000 homes covered by commercial television.

Nevertheless, the FCC—responding to broadcaster pressures—sought to hobble this fledgling medium at birth by highly restrictive program limitations (A 72, 117).[2] The Justice Department, other government agencies, numerous commentators and public-interest groups, the cable industry and others strongly objected to the FCC's protectionist policies (A 136-43, 147-57, 159-64).[3] The FCC was urged to allow this embryonic medium a chance to develop in a free-market environment in order to permit the public to register its preferences and to gather empirical data upon which to make informed judgments; if problems should eventually arise, there would be ample time to respond to them in an appropriate and legal manner. But instead, the FCC opted for premature and illegal regulations

[2] References preceded by "A" are to the FCC's appendix accompanying its petition.

[3] *See also, e.g., Cabinet Committee on Cable Communications, Report to the President* 34-39 (1974); *Cable Television: Promise Versus Regulatory Performance,* prepared by the Staff for the Subcommittee on Communications of the Committee on Interstate and Foreign Commerce, 94th Cong., 2nd Sess. (Subcommittee Print) 61-70 (January 1976); *Noll, Peck & McGowan, supra* note 1, at vii; *Committee for Economic Development, Broadcasting and Cable Television: Policies for Diversity and Change,* 60-69, 72-76 (1975); *P. MacAvoy, ed., Deregulation of Cable Television* 8-9, 90-91 (1977); *R. Smith, The Wired Nation* 30-32, 45-46 (1972); Hagelin, *The First Amendment Stake in New Technology: The Broadcast-Cable Controversy,* 44 *U. Cin. L. Rev.* 427, 524 (1975); Hoffer, *The Power of the FCC to Regulate Cable Pay-TV: Jurisdictional and Constitutional Limitations,* 53 *Denver L.J.* 477 (1976); Kahn, *Cable, Competition, and the Commission,* 24 *Catholic U.L. Rev.* 854 (1975); Note, *Cable Television and Content Regulation: The FCC, the First Amendment and the Electronic Newspaper,* 51 *N.Y.U.L. Rev.* 133, 138-47 (1976).

which the Justice Department described as an example of the "dismal swamp of protectionism."[4]

Prior Proceedings

In 1969, the FCC ordered cable systems to originate programs on certain channels not used for the carriage of broadcast signals in order to increase diversity for viewers. The FCC also authorized pay cablecasting on non-broadcast channels and rejected proposals for program restrictions which broadcasters claimed were necessary to prevent this nascent medium from "siphoning" programs from commercial television in the future. Such restraints, the FCC concluded, would be improper "unless and until experience gives some indication of a *trend* calling for action in the public interest."[5] But eight months later, as a result of broadcaster pressures, the FCC inexplicably reversed its position although pay cable was not even in existence at the time.[6] Thus, the FCC banned from pay cable all series programs, most motion pictures, thousands of sports events and all advertising; and it also prohibited pay cable from devoting more than 90% of its time to sports and movies combined.[7]

The Justice Department and others sought immediate reconsideration of this unexplained switch in

[4] Reply Comments, Oct. 1974, at 10. (All references to Comments and Reply Comments herein are to filings in FCC Docket 19554.)

[5] *First Report and Order in Docket 18397,* 20 F.C.C.2d 201, 204 (1969) (emphasis added).

[6] *Memorandum Opinion and Order in Docket 18397,* 23 F.C.C.2d 825 (1970).

[7] Similar restrictions had been imposed on over-the-air pay television (STV) (A 27-28).

positions suppressing competition and sensitive First Amendment rights.[8] After a delay of five years, the FCC issued its present *Report and Order*[9] which continued the program restraints on pay cable with certain modifications. The FCC perpetuated its regulatory scheme even though it admitted that, after years of deliberation, it still lacked "a clear picture" as to pay cable's future (A 171). Nevertheless, the FCC theorized that it should act now to avert "potential ill effects of siphoning before they are actually felt" (A 171). But the FCC made no findings that there would be siphoning, now or even in the remote future. Indeed, petitioner ABC now concedes that there is no present prospect of siphoning (Pet. at 15). And CBS' President recently conceded: "Right now, we don't see it [pay cable] as a major threat."[10] The Commission acted on what the court correctly described as "speculation and innuendo" (A 88-89).

Series Programs

The FCC banned series from pay cable if *one* episode had *ever* appeared on commercial television. Shortly after the rule was attacked in court, the FCC repealed the series rule, conceding that "the program

[8] The court below found no explanation for the FCC's "quick reversal" of position (A 30). The FCC now explains that it forgot to "focus" on the issue originally (Pet. at 5).

[9] *First Report and Order in Docket 19554*, 52 F.C.C.2d 1 (A 123-204), *reconsideration denied*, 54 F.C.C.2d 797 (1975) (A 205-18).

[10] *Television Digest*, March 14, 1977, at 2. Similarly, the Justice Department stated that "the factual record before the Commission is barren of any credible evidence that siphoning has happened or more importantly is going to happen." Reply Comments, Oct. 1974, at 6; *cf. Noll, Peck & McGowan, supra* note 1, at 148-49.

siphoning that we have sought to prevent is unlikely to occur" (A 224) and that pay cable operations do not pose "the siphoning threat to series programs that we once though they might" (A 226-27). Thus, after years of suppressing massive amounts of free speech and competition, the FCC suddenly confessed error.

Motion Pictures

The complex motion picture rules—highly restrictive and capricious—were also jettisoned by the FCC. Under the repudiated rules:

> —Pay cable could offer motion pictures, without bureaucratic restriction, *only* within 3 years of theatrical release (A 173, 193)—an arbitrary cut-off date that denied pay cable access to the long-running theatrical "blockbusters" which the FCC conceded were vital to this new medium's success.[11]
>
> —Movies 3-to-10 years old were ineligible for pay cable unless they were under license to commercial television (A 173-74, 193)—a "meaningless"[12] exception because, as the FCC itself conceded, broadcasters traditionally insist on exclusivity against pay cable in film licenses (A 177-178; *see* A 129, 135, 141-42).

[11] *Further Notice of Proposed Rule Making in Docket 19554*, 48 F.C.C.2d 453, 457 (1974). Even films within three years of release can be preempted by network "exclusivity" practices questioned by the court on antitrust and diversity grounds (A 17-18 n. 4).

[12] Testimony of President of CBS at Hearings Before the Subcommittee on Antitrust and Monopoly of the Senate Committee on the Judiciary on the Pay-Cable Television Industry, July 8, 1975, at 160-61.

—Post 10-year-old films—despite repeated television exposure—were nevertheless banned from pay cable unless they had not been telecast by commercial television for the prior three years because, the FCC reasoned, if such old films had not been telecast for three years then they must be "undesirable" (A 175-76, 193, 211).

The court below struck down all of these arbitrary and protectionist restrictions on numerous substantive grounds. The FCC acquiesced in this holding. It publicly announced that it would not seek review of the motion picture rules (A 247) [13] and explicitly excluded this issue from its current petition (Pet. at 7 n. 5, 8 n. 10). Indeed, after the opinion below, the FCC's Chairman told a Congressional Committee that the movie rules were not "necessary" after all.[14] He added: "I believe the Commission might well have arrived at the same conclusion about the film rules, even without the *Home Box Office* case, but could not act so long as the case remained undecided." [15] Thus, after years of suppressing massive amounts of free speech and competition, the FCC now cavalierly says it was all a mistake.

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[13] *Also see* FCC Motion For Partial Stay of Mandate, April 18, 1977, at 3; FCC Response to National Subscription Television Motions for Leave to Intervene and Suggestion for Rehearing En Banc, April 22, 1977, at 2; *Notice of Proposed Rule Making in Docket 21311*, 42 Fed. Reg. 34341 (July 5, 1977).

[14] Statement of Richard E. Wiley, FCC Chairman, at Hearings Before the Subcommittee on Communications of the Senate Committee on Commerce, Science and Transportation, Oversight Hearings on Cable Television, June 6, 1977, at 26.

[15] *Ibid.*

Sports

The remaining sports rules, as the court below concluded, are just as illegal and capricious as the repudiated motion picture and series rules. If anything, the sports rules are even more illogical and arbitrary.

Specific Events: Specific events (such as a PGA golf tournament) are banned from pay cable if they have been telecast during any *one* of the prior five years (A 181-82, 193). Accordingly, if a specific event is dropped by commercial television, home viewers would have to wait five years to see that event on pay cable. In the meantime, there would be a total blackout on all media.

Non-Specific Events: Such sports events are divided into four categories: regular season home games, regular season away games, pre-season home games and pre-season away games. The eligibility of such events for pay cable depends on whether 25% or fewer of such events in a particular category were broadcast over commercial television in any *one* of the past five seasons. If fewer than 25% of the events in a category were telecast in *each* of the past *five* years, then the number of games available to pay cable is the number not telecast in the "high-water mark season" (*i.e.*, that season in the past five when the most games were telecast)—even though fewer or no games at all are currently available on commercial television (A 184, 193). On the other hand, if 25% or more of the events in a category were telecast in any *one* of the prior *five* years, then pay cable has access to only *half* the number of remainder games not telecast in the high-water mark season—regardless of the number of games currently being shown on commercial television (A 184,

193-94). Moreover, the arbitrary 50% remainder limitation is subject to a still further arbitrary reduction —if the number of games telecast in the current season is fewer than the number telecast in the high-water mark season, then there must be a *pro rata* reduction in pay cable's use (A 184, 194).

These arbitrary rules go far beyond any concern about possible siphoning. The FCC, in effect, concedes that it wishes to create an exclusive warehouse of sports events for commercial television in the event that broadcasters may want games tomorrow which they have rejected today (A 185). These rules, as noted by the court (A 91), produce the anomalous result that as fewer events are available to viewers on commercial television, fewer events are available to viewers on pay cable.[16]

The FCC significantly failed to explain the arbitrary criteria for the maze of sports rules. Similarly, the present petitions carefully avoid any description of these highly capricious rules. Indeed, the FCC's Chair-

[16] The bizarre impact of the sports rules is illustrated by a concrete example involving the New York Yankees. The Yankees' 81 away games, according to the record below, have the following telecast history: 1970—45; 1971—49; 1972—35; 1973—32; 1974—37; 1975—30. Thus, after an atypical high of 49 games in 1971, the Yankees stabilized at an average of 33 telecasts. Under the basic rule, pay cable would have access to only 16 away games (81 total away games minus the high-water mark of 49 = 32 games: 50% of 32 = 16). But this would then have to be reduced further because Yankee away games in 1975 were 40% below the atypical 1971 high-water mark season. That would give pay cable access to only 10 away games. Thus, although commercial television supported only 30 of the 81 Yankee away games in 1975, pay subscribers would be limited to only 10 games. As a result of FCC regulations, 41 away games—more than 50% of the Yankee away games—would be unavailable to television viewers on any medium.

man recently told a Congressional Committee: "I am not tied to the current sports rules."[17]

Ban on Advertising

In a cryptic paragraph (A 188), the FCC banned all advertising on pay cable. The only reason given by the FCC was that this rule "produced little dissent" (A 188). This rule—which the Justice Department noted had the effect of protecting television from possible competition for advertising[18]—is now relegated to a cursory footnote in the FCC's petition (n. 16).

Ninety Percent Rule

The FCC, in another cryptic paragraph (A 188), ruled that pay cable could not devote more than 90% of its time to motion pictures and sports combined (A 188). The FCC's rationale, unrelated to alleged siphoning, was that this quota might encourage program diversity. The 90% rule is now also relegated to a cursory footnote in the FCC's petition (n. 16).

OPINION BELOW

The pay cable rules were challenged by numerous parties, including the Justice Department even though it was a statutory respondent. The Court of Appeals, in a unanimous opinion (A 1-113), invalidated all of the rules on numerous independent grounds—any one

[17] Testimony of Richard E. Wiley, FCC Chairman, at Hearings Before the Subcommittee on Communications of the Senate Committee on Commerce, Science and Transportation, Oversight Hearings on Cable Television, June 6, 1977, at 39.

[18] Brief of the Justice Department in the Court of Appeals, February 1976, at 15 n. 9.

of which would have been dispositive standing alone. The court concluded that: (1) the FCC far exceeded its "ancillary jurisdiction" over cable television by dictating the programs it could not offer and banning advertising; (2) the rules all violate fundamental First Amendment rights of viewers, pay cablecasters and program suppliers and, moreover, are "grossly" overbroad; (3) the FTC failed even to consider the anticompetitive considerations which it conceded were critical to discharge its public-interest mandate; (4) the rules were all arbitrary and there was no evidence or reasoned analysis, but merely "conjecture and innuendo", to support the FCC's professed concern about the possibility of "siphoning" in the distant future; and (5) there was a procedural irregularity because *ex parte* contacts during the crucial decision making stage appeared to have shaped the FCC's protectionist policy.

REASONS FOR NOT GRANTING CERTIORARI

There is no issue worthy of certiorari. The vestiges of the pay cable rules—like the repudiated rules as to motion pictures and series—are not defensible. They were struck down on the basis of well-established legal principles long approved by this Court. Nor is there any conflict among the Circuits.

(1) Petitioners' claim that the FCC can use the "ancillary jurisdiction" rubric to dictate pay cable's programs and ban advertising defies this Court's landmark opinions in *Southwestern*[19] and *Midwest*[20] and

[19] *United States* v. *Southwestern Cable Co.*, 392 U.S. 157 (1968).

[20] *United States* v. *Midwest Video Corp.*, 406 U.S. 649 (1972).

the Communications Act's basic goals of diversity, free speech and competition.

(2) Petitioners do not refute the court's holding that the program rules and advertising ban all violate fundamental First Amendment principles traditionally protected by this Court. Instead of addressing this Constitutional issue squarely, petitioners resort to academic arguments about the First Amendment status of CATV's carriage of scarce broadcast signals —a matter not germane to the suppression of free speech when cable originates its own programs on nonbroadcast channels. Moreover, petitioners are all significantly silent as to the court's additional holding that the rules are "grossly overbroad" under the First Amendment.

(3) Petitioners are also significantly silent as to the court's holding that the pay cable rules ignore the very antitrust considerations which the FCC repeatedly recognized were essential to resolve in discharging its public interest mandate.

(4) Nor do petitioners refute the court's holding that the FCC acted on the basis of "conjecture and innuendo" rather than evidence or reasoned analysis. Instead, petitioners suggest that the FCC should have *carte blanche* to act on the basis of sheer guesses as to the remote future—even though basic First Amendment rights are at stake and even though the FCC now confesses error as to its past predictions and admits that it still lacks a "clear picture".

(5) Finally, petitioners do not dispute the court's conclusion that *ex parte* contacts during the crucial decision-making process shaped the protectionist rules and violated basic principles of fairness and due pro-

cess. Instead the FCC basically questions the effect of *dictum* in the opinion on other rule-making proceedings—*dictum,* moreover, which is now the subject of further consideration by the lower court in another pending appeal.

I

THE REMAINING PROGRAM RESTRAINTS, LIKE THE REPUDIATED RULES, ARE INVALID FOR THE MULTITUDE OF INDEPENDENT SUBSTANTIVE REASONS GIVEN BY THE COURT

The rules exceed the FCC's "ancillary jurisdiction" over cable television

This Court held in *Southwestern* and *Midwest* that the FCC's jurisdiction over cable television "is restricted to that reasonably ancillary to the effective performance of the Commission's various responsibilities for the regulation of television broadcasting" (392 U.S. at 178; 406 U.S. at 651). Relying on *Southwestern* and *Midwest,* the court below correctly concluded that the program rules and advertising ban exceeded the FCC's "ancillary jurisdiction" over cable television—particularly because of the FCC's contrary policies as to broadcast entertainment programs; the adverse impact of the rules on First Amendment interests; and the lack of any record support or a cogent public interest rationale for the rules (A 37-56).

In *Southwestern,* while upholding the Commission's authority to limit CATV's importation of distant broadcast signals into a local community to protect new media like UHF and educational stations in conformity with Congressional policies, this Court cautioned: "We express no views as to the Commission's authority, if any, to regulate CATV in other circumstances

or for any other purposes" (392 U.S. at 178). In contrast to *Southwestern,* the FCC here is acting to impede a new medium, and is doing so without "substantial evidence" of any public interest reason warranting such drastic action (*see* 392 U.S. at 177).

In *Midwest*—particularly germane here because it dealt with cable's origination of programs on nonbroadcast channels—this Court upheld rules requiring cable systems to originate programs in order to provide viewers with new outlets of expression for diverse programs (406 U.S. at 667-70). But in this 5-to-4 decision, the Chief Justice's decisive concurring opinion warned:

> "Candor requires acknowledgement, for me at least, that the Commission's position strains the outer limits of even the open-ended and pervasive jurisdiction that has evolved by the decisions of the Commission and the courts" (406 U.S. at 676).

If directing cable systems to originate programs "strains the outer limits" of ancillary jurisdiction, those limits are surely exceeded by dictating what programs not to originate, by imposing quotas on sports and movies, and by banning all advertising. Moreover, the program restrictions here defeat the very goals stressed in *Midwest*—namely, the stimulation of new outlets of expression and the widest diversity of programs from different sources.

The rules frustrate the basic goals of the Communications Act which the Commission is charged with implementing—including free speech, pro-competition and diversity policies. As this Court has long recognized, the FCC's plenary jurisdiction over broadcasting does not give the Commission the power to ban

programs or advertisements on broadcast television (*see Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367, 396 (1969); *FCC* v. *Sanders Brothers Radio Station*, 309 U.S. 470, 475 (1940)), or to deny entry to new broadcasters because they might compete with entrenched broadcasters for programs or advertisers (*FCC* v. *Sanders Brothers Radio Station*, 473-75 (1940)). Thus, the FCC clearly does not have "ancillary jurisdiction" to impose the present regulations on cable television.

Instead of dealing with these specific issues relevant to the scope of "ancillary jurisdiction", petitioners resort to rhetoric about television programming in general and doomsday predictions that the infant pay cable may someday threaten powerful commercial television. But those far-fetched claims were specifically rejected by the FCC's own opinions (A 44, 225).

The rules violate the First Amendment

The court, like all the commentators, correctly recognized that cable television with its multi-channel capacity is entitled to full First Amendment protection like newspapers (A 77-80).[21] In this connection, the court distinguished cable from broadcasting which

[21] This is the unanimous view of those who have considered this issue. *Weaver* v. *Jordan*, 64 Cal. 2d 235, 411 P.2d 289, *cert. denied*, 385 U.S. 844 (1966); *Cabinet Committee on Cable Communications, Report to the President* 15 (1974); *Sloan Commission, On the Cable: The Television of Abundance* 43 (1971); Hoffer, *The Power of the FCC to Regulate Cable Pay-TV: Jurisdictional and Constitutional Limitations*, 53 *Denver L.J.* 477 (1976); Note, *Cable Television and Content Regulation: The FCC, The First Amendment and the Electronic Newspaper*, 51 *N.Y.U.L. Rev.* 133 (1976); Note, *Cable Television and the First Amendment*, 71 *Colum. L. Rev.* 1008 (1971).

uses public airwaves and suffers from spectrum scarcity and problems of physical interference—unique factors which subject broadcasting to special First Amendment rules. *Compare Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367 (1969), *with Miami Herald Publishing Co.* v. *Tornillo*, 418 U.S. 241 (1974).

The court concluded that all the program rules violated the First Amendment (a) because there was no over-riding public interest reason warranting any interference with free speech and (b) because the rules, in any event, were grossly overbroad in terms of their professed objective (A 75-91). Thus, the court declared:

> "The no-advertising and 90-percent rules clearly violate *O'Brien's*[22] first criterion. Not only do they serve no 'important or substantial . . . interest,' 391 U.S. at 377, they serve no purpose which will withstand scrutiny on this record. The sports and feature films rules fare no better. We have already concluded that the Commission has not put itself in a position to know whether the alleged siphoning phenomenon is a real or merely a fanciful threat to those not served by cable. Instead, the Commission has indulged in speculation and innuendo. *O'Brien* requires that 'an important or substantial governmental interest' be demonstated, however—a requirement which translates in the rulemaking context into a record that convincingly shows a problem to exist and that relates the proferred solution to the statutory mandate of the agency. The record before us fails on both scores" (A 88-89; footnotes omitted).

The court, in addition, concluded that the "rules are grossly overbroad" and that "[e]xamples of this are

[22] *United States* v. *O'Brien*, 391 U.S. 367 (1968).

legion" (A 91). The court declared that the rules were not "closely tailored to the end to be achieved" and thus would cause a "loss of diversity and unnecessary restriction of the First Amendment rights of producers, cablecasters and viewers" (A 89). With respect to the sports rules at issue, the court stated:

> "[I]n some circumstances the sports rules have the anomalous effect of reducing the number of non-specific games that can be shown on cable television at the same time that broadcasters are reducing the number of games they will show. This provision is apparently justified on the ground that it is too difficult to monitor the reasons broadcasters cut back their game schedules and at least some cutbacks might be caused by cable competition. However, this record reveals no reason to think that cutbacks represent siphoning any more than they represent editorial or commercial judgment. Where the First Amendment is concerned, creation of such a rebuttable presumption of siphoning without clear record support is simply impermissible. *Cf. Freedman* v. *Maryland, supra*, 380 U.S. at 58. Other examples could be cited, but this would only belabor points already extensively presented to the Commission" (A 91; footnote omitted).

The FCC's total ban on commercials, moreover, specifically violates this Court's recent opinions recognizing that the First Amendment protects advertisements.[23]

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[23] *Bates* v. *State Bar of Arizona*, 45 U.S.L.W. 4895 (June 27, 1977); *Carey* v. *Population Services Int'l*, 45 U.S.L.W. 4601, 4606-07 (June 9, 1977); *Linmark Associates, Inc.* v. *Township of Willingboro*, 45 U.S.L.W. 4441 (May 2, 1977); *Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976); *Bigelow* v. *Virginia*, 421 U.S. 809 (1975).

Petitioners do not squarely address the basic First Amendment holding and they totally ignore the question of overbreadth. Instead, they argue that *Black Hills*[24] and several other lower court opinions create a conflict as to whether cable television has greater First Amendment rights than broadcasters. But those cases all dealt with CATV's carriage of scarce broadcast signals and not with cable's origination of its own programs on its multiple non-broadcast channels.[25] Ignoring that critical distinction, petitioners try to lump together cable's retransmission and origination functions—an illogical approach flatly rejected by this Court in *TelePrompTer Corp.* v. *Columbia Broadcasting System, Inc.*, 415 U.S. 394, 405 (1974) ("the reception service" of cable television and its "origination service" are "separate and different operations").[26]

Moreover, although cablecasting is entitled to full First Amendment protection like newspapers, the program rules and advertising ban would be unconstitutional even under this Court's opinions as to the special First Amendment standards applicable to spec-

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[24] *Black Hills Video Corp.* v. *FCC*, 399 F.2d 65 (8th Cir. 1968).

[25] Virtually all of petitioners' citations, moreover, concerned the FCC's rule prohibiting cable from importing distant broadcast signals carrying the *identical* programs being offered to viewers by local broadcasters. Those cases thus did not uphold rules decreasing diversity of programs for viewers or restrictions on origination of non-broadcast programs. Indeed, *Titusville Cable TV, Inc.* v. *United States*, 404 F.2d 1187 (3d Cir. 1968)—cited by the FCC (Pet. at 17 n. 21) and ABC (Pet. at 15 n. 28)—stressed that there were "no direct restrictions in the Commission's regulations which would prohibit petitioners from originating their own programs" 404 F.2d at 1189.

[26] *Accord, National Association of Regulatory Utility Commissioners* v. *FCC*, 533 F.2d 601, 613 (D.C. Cir. 1976).

trum-scarce broadcasting. Thus, while the FCC may pass limited regulations indirectly affecting the programming of broadcasters in certain discrete situations, it surely cannot pass blunderbuss rules banning entertainment programs or advertising or setting arbitrary quotas. *Columbia Broadcasting System, Inc.* v. *Democratic National Committee,* 412 U.S. 94, 110-11, 116, 120, 127 (1973); *id.* at 146 (Stewart, J., concurring); *Red Lion Broadcasting Co.* v. *FCC,* 395 U.S. 367, 396 (1969); *FCC* v. *Sanders Brothers Radio Station,* 309 U.S. 470, 475 (1940).[27] Broadcasters' freedom is abridgeable in only very limited cases (such as fairness in the debate of public issues) in order to promote diversity of viewpoints because of channel scarcity. No such considerations are involved here in connection with broadside rules suppressing massive amounts of entertainment programming on a new medium of multi-channel capability.

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[27] Contrary to its position in this case, the FCC has recently stated:

> "The power to regulate the type and quality of programming is clearly beyond the authority of this Commission. The First Amendment and Section 326 of the Communications Act of 1934 would prevent governmental intrusion into such areas."

Report and Order in Docket 20203, 61 F.C.C.2d 946, 949 (1976) (no regulation of re-run programs in prime time). *Accord, Memorandum Opinion and Order in Docket 20682,* 60 F.C.C.2d 858, 859 (1976) (no regulation of entertainment formats in broadcasting); *Children's Television Report and Policy Statement,* 50 F.C.C.2d 1, 2-3 (1974), *aff'd sub nom. Action for Children's Television* v. *FCC,* No. 74-2006 (D.C. Cir. July 1, 1977), *petition for rehearing pending* (no ban on advertising or program quotas in connection with children's programs); *Memorandum Opinion and Order in RM-2652,* 60 F.C.C.2d 641, 643 (1976) (no prohibition of multiple exposures of more than one episode of the same program in prime time access periods).

Finally, petitioners complain that the court below upheld the FCC's over-the-air pay television rules (STV) in the *NATO case*[28] and left them intact in the current opinion. This is a red herring. In the instant case, nobody directly challenged the STV rules;[29] and, after the opinion below, the FCC decided to conform the STV and pay cable rules.[30] Moreover, in the *NATO* case, the STV service at issue "blacked-out" scarce channels, whereas cable has a multi-channel capability—a critical distinction emphasized by the court (A 75).[31] In any event, the *NATO* appeal—brought by theatre owners to kill STV and not to defend anybody's First Amendment rights—did not deal with the factual basis for the STV rules or the issue of overbreadth. As the court stressed here: "[A]ny assessment of First Amendment gains and losses must be made on the basis of the record in front of us today" (A 77 n. 79). The court below, fully aware of the circumstances involved in *NATO*, correctly distinguished its earlier opinion in that case.

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[28] *National Ass'n of Theatre Owners* v. *FCC,* 420 F.2d 194 (D.C. Cir. 1969), *cert. denied,* 397 U.S. 922 (1970).

[29] One STV aspirant filed, and then withdrew, a petition for review of the STV rules.

[30] FCC Motion for Partial Stay of Mandate, April 18, 1977, at 9-10; FCC Response to National Subscription Television Motions for Leave to Intervene and Suggestion for Rehearing En Banc, April 22, 1977, at 2-3.

[31] The court stated that *NATO* concerned "how to allocate television licenses" and rested on "the scarcity rationale" (A 76, 77 n. 79).

The Commission disregarded relevant antitrust considerations

Pro-competition policies of the antitrust laws are an essential ingredient of the public interest standard of the Communications Act.[32] Here, as the court observed, the FCC "throughout these proceedings found the antitrust issue to be relevant to discharge of its public interest obligation" (A 69). The FCC, for example, asked at the outset of its opinion (A 125-26):

> "Would not the development of a pay system of program distribution help to cut back the network domination of program production and dissemination?"
>
> * * *
>
> "Would the competition provided to conventional television result in an upgrading of the programming found on commercial television?"

But, as the court correctly concluded, the FCC totally ignored the antitrust issues which it admitted were crucial to the discharge of its public interest obligations.[33] Instead, the FCC opted for "hobbling cable television" by "highly restrictive" rules in order to insulate entrenched broadcasters with "monopsony power" against possible future competition (A 65, 72, 117). Significantly, the petitions are all silent on the critical antitrust issue.

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[32] *United States* v. *Radio Corp. of America*, 358 U.S. 334, 351-52 (1959); *FCC* v. *Sanders Bros. Radio Station*, 309 U.S. 470 (1940).

[33] The court noted that the FCC's entire consideration of the antitrust issues was confined to a single cryptic paragraph which is "obviously flawed" and "completely irrelevant to most of the antitrust issues raised" (A 70). The court declared: "We cannot fathom how the Commission reached the conclusion that the balance here should be struck in favor of regulation" rather than competition (A 70).

The rules are arbitrary and capracious and not based on evidence or reasoned analysis

The court below correctly found that there was no record support or cogent rationale for the rules. There is admittedly no present prospect of so-called siphoning; and if siphoning should ever appear likely, there would be ample time for any action which might be legal and appropriate.[34] The court found that the FCC's professed concern about the possibility of siphoning in the remote future was based—not on facts, probabilities or reasoned analysis—but on "speculation and innuendo" (A 88; *also see* A 60-68). Pointing to the FCC's own admission that it lacked a "clear picture" as to the future, the Court declared:

> "The Commission's lack of a clear picture is directly attributable to its own choice to regulate rather than allow a period of unregulated experimentation in which data could be generated that could form a predicate for informed agency action.
>
> * * *
>
> "In this state of affairs, where there is no evidence of any urgent need for preventive action and where approval of the Commission's position would foreclose the possibility that data could be generated in the future that would allow fully informed decisionmaking, we are disinclined to give the Commission the 'benefit of the doubt' which it argues it should have" (A 61-62 n. 60).

The present petitions do not dispute the lack of evidence or reasoned analysis for the rules. On the con-

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[34] Congress, for example, has shown considerable interest in assuring public access to televised sports in anti-blackout legislation. Act of September 14, 1973, Pub. L. No. 93-107, 87 Stat. 350, 1973 U.S. Code Cong. & Adm. News 4[illegible].

trary, petitioner ABC concedes that pay cable now lacks the "economic capacity to outbid free television for much, if any, of its program attractions" (Pet. at 15).[35]

In the absense of facts or logic, the FCC in effect urges that it should have *carte blanche* to forecast the future even "where there is no concrete supporting evidence" (Pet. at 10, 19-20). But administrative agencies cannot base rules "on pure fantasy, speculation devoid of factual premise."[36] The FCC cannot formulate regulations premised on supposed clairvoyance

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[35] Similarly, NAB recently told Congress that it had no present concern about the siphoning of national sports: "[W]e are not talking about [losing] the World Series or the Super Bowl." Testimony of Vincent Wasilewski, NAB President, at Hearings Before the Subcommittee on Communications of the Senate Committee on Commerce, Science, and Transportation, Oversight Hearings on Television Broadcast Policy, May 10 1977, at 214-15. NAB's concession is understandable because, for example, ABC and NBC, respectively, recently paid $118,000,000 and $80,000,000 for NCAA football games and the next Olympic games. *Broadcasting*, June 20, 1977, at 44; *N.Y. Times*, Feb. 2, 1977, at 1, col. 2; *N.Y. Times*, Feb. 3, 1977, at 67, col. 1. In this connection, the Justice Department stated below: "In view of the relative financial resources of the television and cable industries, and the fact that many television contracts to show sporting events are on a multi-year basis, there does not appear to be any reasonable cause for concern over immediate and large scale siphoning." Brief of the Justice Department in the Court of Appeals, February 1976, at 37-38.

[36] *American Airlines, Inc.* v. *CAB*, 192 F.2d 417, 421 (D.C. Cir. 1951). *Accord*, *FCC* v. *RCA Communications, Inc.*, 346 U.S. 86, 96-97 (1953); *City of Chicago* v. *FPC*, 458 F.2d 731, 742 (D.C. Cir.), *cert. denied*, 405 U.S. 1074 (1972); *Portland Cement Ass'n* v. *Ruckelshaus*, 486 F.2d 375, 391-92 (D.C. Cir. 1973), *cert. denied*, 417 U.S. 921 (1974); *International Harvester Co.* v. *Ruckelshaus*, 478 F.2d 615, 629 (D.C. Cir. 1973).

when (1) sensitive First Amendment rights are at stake; (2) past FCC predictions in this area have proven false and been renounced; (3) the FCC admits that it still lacks a "clear picture"; and (4) the Commission fails to explain why it did not accept suggestions by the Justice Department and others to allow free-market operations in order to determine if any rules were in fact necessary.[37]

II

PROCEDURAL IRREGULARITIES, BASED ON *EX PARTE* CONTACTS, DO NOT WARRANT CERTIORARI

In addition to invalidating the pay cable rules on the merits for a host of reasons, the court below found a procedural error—namely, *ex parte* contacts which shaped the protectionist rules (A 92-106).[38] Such contacts made the public proceedings a "sham"; "conferred preferential advantages on vast segments of the broadcast industry to the detriment of other competing business interests"; and reflected the "often-voiced claims of undue industry influence over Commission proceedings" (A 96, 97, 119).[39] The court held that these

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[37] This was the approach followed by the FCC in repealing the series ban: "We will monitor future events closely, and stand ready to reimpose series program restrictions should subscription operations threaten to reduce the quantity and quality of series programs now available to the public over conventional television" (A 227).

[38] The court was especially critical of *ex parte* activities by petitioners ABC and NAB (A 94-95), who avoid this issue in their petitions.

[39] The court observed that the FCC engaged in these secret discussions during its decision making deliberations despite its Chairman's public condemnation of such practices (A 96 n. 117, 102 n. 123).

secret contacts not only deprived it of the full administrative record for review,[40] but also violated basic standards of due process and fairness under *Sangamon Valley Television Corp.* v. *United States,* 269 F.2d 221 (D.C. Cir. 1959)—a landmark opinion which was decided after this Court remanded the case to the Circuit Court when this Court learned of *ex parte* contacts in an FCC informal rulemaking proceeding. 358 U.S. 49 (1958)."

The court in *Sangamon* declared that "whatever the proceeding may be called it involved . . . [a] resolution of conflicting private claims to a valuable privilege, and . . . basic fairness requires such a proceeding to be carried on in the open" (269 F.2d at 224). The court below, as in *Sangamon,* remanded for evidentiary hearings to determine the nature of all *ex parte* contacts (A 108, 112). But the remand was limited to the STV rules because the pay cable rules were found to be invalid on the merits on numerous grounds (A 107-08, 112-13).

Significantly, petitioners do not question *Sangamon,* or deny the impact of the criticized *ex parte* contacts on the outcome, or challenge the court's determination that this case involved "conflicting private claims to a valuable privilege." Instead, the FCC attacks *dictum* in the opinion which states that there should be no *ex parte* contacts in *any* informal rulemaking proceeding—even those which do not involve "conflicting pri-

[40] *Citizens to Preserve Overton Park, Inc.* v. *Volpe,* 401 U.S. 402, 419-20 (1971).

[41] The continuing vitality of *Sangamon's* rationale was recognized in the House Report on the Sunshine Act. House Report No. 94-800-Part II, 1976 U.S. Code Cong. & Adm. News 2212, 2228.

vate claims." But the limits of the square holding in this case, as opposed to the *dictum* challenged by the FCC, were emphasized in Judge MacKinnon's special concurrence here (A 117-122) and in a subsequent decision by another panel of the United States Court of Appeals for the District of Columbia Circuit. *Action for Children's Television (ACT)* v. *FCC,* No. 74-2006 (D.C. Cir. July 1, 1977) (Slip. Op. at 29-38), *petition for rehearing pending.* The *ACT* panel agreed with the *ex parte* holding in *HBO* and that it followed *Sangamon.* However, because *ACT* did not involve "conflicting private claims to a valuable privilege" like *Sangamon* and the present case, the *ACT* panel held that the *ex parte* contacts were not improper in that proceeding. In this connection, the *ACT* panel did question *HBO's dictum* that *ex parte* contacts should be prohibited in *all* informal rulemaking proceedings. A petition for rehearing, with a suggestion for *en banc* consideration. has recently been filed in *ACT.*

Since the FCC's arguments are directed at *dictum* and, moreover, that *dictum* is currently under consideration by the D.C. Circuit in *ACT,* the matter is surely not appropriate for consideration by this Court.[42]

In any event, the procedural *ex parte* issue and *dictum* are academic here because the program rules as to pay cable have been struck down on the merits and the FCC has indicated that it will conform the STV rules to whatever requirements are applicable to pay cable.

[42] *See, e.g., Wisniewski* v. *United States,* 353 U.S. 901, 902 (1957): "It is primarily the task of the Court of Appeals to reconcile its internal difficulties."

III

THE PETITIONS OF ABC AND NAB DO NOT RAISE ANY ISSUE WORTHY OF CERTIORARI

Although the FCC abandoned the motion picture rule after the decision below and specifically excluded that matter in its present petition (Pet. at 7 n. 5, 8 n. 10), the broadcast petitioners appear to seek a general review of the opinion below and ABC, in particular, complains that "the Commission [does] not contest the Court's ruling with respect to feature films" (Pet. at 4). This is frivolous. After almost a decade, the FCC was forced to drop the protectionist motion picture rule. Since the administrative agency has now in effect confessed error, the issue is moot.

CONCLUSION

The Commission's massive prior restraints on programs—illegal and protectionist—have impeded a struggling new communications medium and deprived the American public of freedom of choice and an opportunity for greater diversity. A five-year regime of such bureaucratic restraints in sensitive free-speech areas is indefensible. The remaining pay cable rules—like the repudiated ones—should be put to an end immediately.

For all of the foregoing reasons, the petitions for writs of certiorari should be denied.

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